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IN THE

Supreme Court of the United States

October Term, 1972

Supreme Court, U. S.
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No. 72-661

JAMES LEDES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered June 1, 1972 [30 N.Y.2d 816], unanimously affirming, without opinion, an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered June 29, 1971 [37 A.D.2d 692], which affirmed, also without opinion, a judgment of the Supreme Court of the State of New York, Bronx County, rendered April 10, 1970, convicting the petitioner, after trial by jury, of six

counts of the crime of Buying and Receiving Stolen Property [New York Penal Law §1308] and six counts of the crime of Concealing and Withholding Wrongfully Acquired Property [New York Penal Law §1308], and sentencing him to an indeterminate term of not less than two and one-half nor more than four years in State Prison on each count, such terms to run concurrently.

Jurisdiction

The jurisdiction of this Court is evoked under 28 U.S.C. §1257(3). The order of the Court of Appeals was entered on June 1, 1972. The order of the Appellate Division was entered on June 29, 1971. An order extending time to file this petition to September 30, 1972 was signed by Mr. Justice Marshall on August 29, 1972; a similar order further extending time to October 30, 1972 was signed by Mr. Justice Marshall on September 20, 1972.

Questions Presented

In our view no substantial federal questions have been presented in this case. Nevertheless, we shall list the claim petitioner has set forth:

> Should this Court let a conviction stand where petitioner's fundamental right to a fair trial was denied by the combination of an inflammatory and prejudicial summation by the prosecutor and by seriously erroneous rulings by the Trial Court?

Statement of the Case

Edward Esposito, Alexander Graham Bell, Joseph Arrighi and James Ledes, petitioner herein, were indicted by the Bronx County Grand Jury on May 6, 1968 for the crimes of Buying and Receiving Stolen Property (seven counts) and Concealing and Withholding Wrongfully Acquired Property (seven counts) in violation of former New York Penal Law §1308. Esposito passed away prior to the trial. The case against Arrighi was severed, the People having promised to dismiss the charges against him upon his having agreed to testify against the other defendants. Petitioner and Bell went to trial on February 9, 1970.

At trial, the prosecution showed, largely through the testimony of Joseph Arrighi, that on July 5, 1967, Arrighi agreed to lease his garage to Edward Esposito so that the latter could store some merchandise there. The next day, a rented truck operated by Alexander Graham Bell and containing some $15,000 worth of stolen women's apparel was backed into Mr. Arrighi's garage. Esposito opened the truck doors and assisted Bell in carrying the stolen goods upstairs into Arrighi's apartment.

Later that evening, the petitioner arrived at the Arrighi apartment and immediately began to discuss the merchandise with Esposito. The two went from room to room examining the garments which were lying all over the place. As the negotiations continued, Esposito, after displaying some bills of lading, informed petitioner that the merchandise was worth $40,000 but that he would sell it all to the petitioner, a carpenter by trade, for $4,000. It was at this

point that Arrighi realized that the garments had been stolen, the price not appearing feasible. Although Esposito indicated his dissatisfaction with the price because he had to pay Bell for driving the truck, he agreed to it after petitioner said he would take care of Bell. Petitioner then gave Esposito $600 as an advance. They then sorted some of the clothes, including approximately six hundred housecoats, for the petitioner to use as samples to show to prospective customers and put them into two cartons, leaving the rest to be picked up by a truck petitioner indicated would be there the following Tuesday. Taking the filled cartons downstairs, petitioner and Esposito put them into the trunk of petitioner's car, after which they both left.

On July 8, 1967, two detectives arrived at Arrighi's apartment to investigate a complaint concerning stolen merchandise. Arrighi let them in and the officers discovered the clothing, with names and tags still on, spread out all over the place. When asked where the garments came from, Arrighi replied they belonged to "Jimmy and Eddie," and that he was minding the goods for them. Shortly thereafter, petitioner and Esposito arrived, each carrying four flat unassembled cartons. Both petitioner and Esposito told the officers they had come because they had heard that they could get a good buy there. All three men were arrested; Bell was subsequently apprehended.

Petitioner testified in his own behalf. He stated that on July 6, 1967, Edward Esposito, whom he had known for a year, asked him to meet with a friend that had some women's and girls' clothes purchased at a closeout. At a restaurant, Esposito introduced petitioner to Joseph Arrighi who mentioned the clothing and asked if petitioner

wanted to buy some for his wife. Two days later, petitioner and Esposito drove to Arrighi's house. After parking, petitioner saw Esposito was carrying some boxes and assisted him in bringing them into the building. Arriving at the top of the stairs, they were confronted by two police officers. When asked what he was doing there, Ledes answered "I heard there was something to buy for my wife and kids there * * * I'm really sorry * * * Forget you saw me. Just let me walk out the way I walked in."

Proceedings on the Motion to Amend the Remittitur

Petitioner moved in the New York Court of Appeals to have the remittitur amended. Throughout the proceedings below, the People maintained that petitioner had failed to avail himself of appropriate state procedures to preserve the issues raised on appeal. Aware that the Court of Appeals may nevertheless overlook procedural requirements and review a record where a defendant's right to a fair trial is questioned, the People also opposed petitioner's motion to amend the remittitur on the ground that the alleged errors did not rise to the level of a denial of constitutional notions of fundamental fairness. The Court of Appeals granted the motion in an order dated November 2, 1972 [—— N.Y.2d —— (1972)], amending the remittitur by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Whether appellant was deprived of due process under the Fourteenth Amendment to the Constitution of the United States."

POINT ONE

Petitioner was not deprived of due process under the Fourteenth Amendment to the Constitution of the United States.

From the amended remittitur we cannot ascertain whether the Court of Appeals considered each individual claim advanced by petitioner or weighed the pervasive impact of the alleged errors on petitioner's right to a fair trial. It is our position that, treated singularly, the claimed errors do not in any way suggest that the trial failed to comport with contemporary standards of due process. Nor would the accumulation of innocuous error lead to the conclusion that defendant was deprived of the protection afforded him by the Fourteenth Amendment. With this in mind, we turn our attention to the contentions advanced by petitioner.

A. Statements of the Prosecutor in His Summation Were Not Prejudicial.

During the course of the defense summation, comments were made that the People's principal witness, Joseph Arrighi, "did not testify until he elicited a promise from the Prosecutor, that the charges against him would be dismissed" and that "we all know what Joseph Arrighi got for his testimony". This prompted the Prosecutor to offer the following explanation in his summation as to why the People chose Arrighi to turn State's evidence and decided to prosecute:

> "Well, you might ask yourselves, why Joseph Arrighi * * *?

"Well, first of all, Gentlemen, the People must look at who is in the center of this particular crime. Who is the prime perpetrator? James Ledes.

"Now Joseph Arrighi is in it. But you have to go after the people that are at the center of the crime. Another consideration, you have to look at a man's criminal background. Does a man have prior conflict with the law? Again, James Ledes fits the bill.

"So this is the type of man you go after, and you utilize the testimony of a man like Arrighi."

Petitioner now seizes upon this remark to argue that the People used his criminal background as a vehicle by which the jury could infer that he had a propensity to commit the crimes with which he was charged. Rather than suggesting criminal predisposition, such statement can clearly be seen as a warranted response to the comments made by petitioner's own counsel on the issue of the People's motivation for using Arrighi [see, *Buchalter* v. *People of the State of New York,* 319 U.S. 427 (1943); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *United States* v. *Ramos,* 268 F.2d 878 (2d Cir. 1959)]. Furthermore, the Court in its charge curatively instructed the jury:

"If any witness has been previously convicted of a crime, you may consider that in determining what weight, what credit, and what belief you will attach to that witness's testimony, in the case."

This instruction indicated to the jury the proper treatment to be accorded petitioner Ledes' criminal background. Such instruction was sufficient to counteract whatever may have been the effect of the District Attorney's comments with regard to such background. We also note that Ledes had taken the stand in his own defense thus putting his credi-

bility in issue, and the Prosecutor's comment was a proper evaluation of such credibility and of the weight to be afforded such testimony. That no error flowed from this remark is evidenced by the failure of petitioner to object thereby rendering the issue unavailable for appellate review [*People* v. *Vidal*, 26 N.Y.2d 249 (1970)].

At another point in his summation, the District Attorney stated:

> "All right, was Arrighi telling the truth? Let's get right down to it. You bet he was telling the truth. Don't take my word for it, but listen, gentlemen, listen if you will."

The Prosecutor then engaged in a review of Arrighi's testimony to which petitioner offered no objection. By this comment, all the District Attorney was stating was, in different words, that there existed sufficient credible evidence to establish petitioner's guilt beyond a reasonable doubt. He was not seeking to make himself an unsworn witness, nor was he supporting his case by invoking his own veracity and position. On the contrary, the particular language negates any such inference that the Prosecutor was speaking from personal knowledge. Therefore, we submit that petitioner's contention that the Prosecutor was improperly vouching for the credibility of his witness is without merit. In any case, such a passing remark under these circumstances could not constitute error [*Lawn* v. *United States*, 355 U.S. 339, 359-60, n.15 (1958); *Jackson* v. *United States*, 359 F.2d 281 (2d Cir. 1964)]. This conclusion gains support from defense counsel's failure to object to the comment.

Nor did any prejudice result from the following comment of the Assistant District Attorney:

> "Let's see if he [Ledes] told any other falsehoods. On direct examination he stated that he was the owner of his business. Well, the People don't go into this type of case without investigating a man and conducting an investigation."

Contrary to petitioner's contention, the jury was not led to believe the Prosecutor was in possession of additional facts not presented to them. The People did not imply personal knowledge from undisclosed sources nor did they rely upon the integrity of their office [*United States* v. *Hyshohion*, 439 F.2d 274 (2d Cir. 1971)]. In any event, the jury was promptly instructed to disregard the comment as to an "investigation" [*People* v. *Gowsky*, 244 N.Y. 451 (1927)].

It is also contended that the Prosecutor made unfair comment on the evidence when he said of the petitioner:

> "Another deliberate falsehood, another indication of his failure to tell the truth. Another factor for you to consider, of whether he is the type of man to tell the truth under oath, in this type of a case."

Besides the fact that petitioner never objected to the remark, in no way could this be deemed to have denied him a fair trial. All that the statement did was what all summations are permitted to do—draw logical deductions from the testimony and evaluate a defendant's credibility. A Prosecutor in his closing remarks has the prerogative of commenting upon the evidence and estimating its weight and probative value [*People* v. *Doody*, 172 N.Y. 165 (1912);

see, also, *United States* v. *DeFillo*, 257 F. 2d 835 (2d Cir. 1958)].

The People's remarks which are attacked should not be lifted out of context, thereby distorting the impression to be derived from a consideration of the entire summation [*United States* v. *Angelet*, 231 F. 2d 190 (2d Cir. 1956) *cert. den.* 351 U.S. 952 (1956)]. Viewed in the context of the entire summation, such comments did not prejudice petitioner's rights to a fair trial. However, should this Court disagree and be of the opinion that the People's statements were improper, it is submitted that any error flowing therefrom was, in view of the overwhelming proof of guilt of the crimes charged, harmless beyond a reasonable doubt [*Chapman* v. *California*, 386 U.S. 18 (1967); *People* v. *Schwartzman*, 24 N.Y. 2d 241 (1969); New York Code Crim. Proc. §542].

B. Inquiry into the Conversation Between Arrighi and Defense Counsel in the Latter's Office Was Properly Denied.

Prior to the introduction of any evidence and in the absence of the jury, defense counsel, Mr. Altman, made the following statement to the Court concerning the fact that Arrighi had previously approached him and questioning whether the conversation that ensued was subject to the attorney-client privilege:

> "Mr. Altman: • • •
>
> "One of the People's witnesses that will, I expect will be called, had come to me to ask me to represent him in this case,—
>
> "The Court: Yes.

"Mr. Altman: —on the original indictment. Now I explicitly explained to him at the time that I could not represent him, because there was a conflict of interest. But he made certain statements to me, which were, I believe, contrary to what he would testify to at trial. Now I don't know what he is going to testify to at the trial. I am concerned about a limitation, in my cross-examination, which may be imposed by the attorney-client confidential communication privilege. I don't know how far, in this circumstance, it would extend.

"Now I had told him that I was unable to represent him, because of the conflict, and much of what he discussed wtih me was elicited, or came from him after I had told him this. Now I don't know how far I can go on this, and rather than going into the matter once he is brought to the stand, I thought I would broach the problem to Your Honor at this time."

The District Attorney responded that:

"Mr. Cantor: • • • after speaking with Mr. Arrighi, Your Honor, I am led to believe that no statements whatsoever were made by Mr. Arrighi to Mr. Altman; that the sole purpose of the meeting was Mr. Altman's calling Mr. Arrighi there, and then referring Mr. Arrighi to another attorney, to an attorney other than Mr. Altman, because of the reason that Mr. Altman would have a conflict. But Mr. Altman, according to Mr. Arrighi, and my interviewing of the witness, Mr. Altman was showing an amicability towards Mr. Arrighi. He wanted him to be placed in the hands of a workable collegue [*sic*], shall we say, someone who would work hand-in-hand with Mr. Altman on this defense."

The Court was "not prepared to make any ruling at this point" but understood that "so long as we give you

[defense counsel] an opportunity between the direct and cross, to be satisfied by a ruling of the Court, that will take care of your position." Although counsel agreed, he did not seek such a ruling between direct and cross-examination.

During the People's case-in-chief, Arrighi stated that, after being arrested, he had gone to Mr. Altman's office to see him at Jimmy Ledes' request. Bell and Ledes were there with Mr. Altman. Arrighi did not request that Mr. Altman represent him. On cross-examination, defense counsel sought to elicit from Arrighi greater detail as to what transpired in his office. The People's objections to this line of questioning were sustained. Nor was Mr. Altman, who testified on behalf of both defendants, permitted to testify concerning the circumstances surrounding Arrighi's visit to his office.

Contrary to petitioner's contention, the attorney-client privilege was properly invoked. Even though Arrighi stated he did not request petitioner's lawyer, Mr. Altman, to represent him in the case, Arrighi, being at the time a defendant in the criminal action, may nevertheless have been seeking legal advice from him, a relationship countenanced by the privilege [see, *Bacon* v. *Frisbe,* 80 N.Y. 394 (1880); *Richardson on Evidence,* §428; *Wigmore on Evidence,* §2292]. Such a conclusion is reasonable in view of the presence of two of Arrighi's co-defendants in the office at the time.

The rule advanced by petitioner that statements qualifying as privileged lose their protected status when the attorney asserts he cannot represent the declarant would

defeat the public policy of free disclosure by persons seeking professional legal advice. As long as the disclosures are made in reliance upon the privilege initially existing, the timing of an attorney's statement that he cannot act as counsel should not be allowed to strip of their privileged status any additional declarations uttered during the same meeting but subsequent in time [*Doheny* v. *Lacy*, 168 N.Y. 213 (1901); *Hurlburt* v. *Hurlburt*, 128 N.Y. 420 (1891); see, also, *In re Bonanno*, 344 F. 2d 830 (2d Cir. 1965)].

Nor does the presence of Bell and petitioner vitiate the privilege by negating the element of confidentiality. Since they were co-defendants of Arrighi, any discussion by Arrighi of the pending criminal case should be deemed to have occurred in the course of a "peculiar relation of confidence" in which Bell and petitioner shared [*Continental Oil Co.* v. *United States*, 330 F.2d 347 (9th Cir. 1964); *People* v. *Buchanan*, 145 N.Y. 1, 26 (1895), *cert. den.* 158 U.S. 31 (1895)].

Defense counsel was afforded the opportunity by the Court to seek a ruling as to whether the privilege obtained and, at the same time, to move to offer sworn testimony as to the conversations in question at a hearing in the absence of the jury. His failure to avail himself of such opportunity lends support to the validity of the Court's ruling that the privilege was properly invoked. Also, we note that at no point, neither during the questioning of Arrighi nor during petitioner's motions at the conclusion of the evidence, did petitioner except to the Court's refusal to admit the testimony at issue. Such failure renders the issue unavailable for appellate review.

Nevertheless, in the event that the privilege did not obtain and that the ruling below was erroneous, we would submit that such error was harmless beyond a reasonable doubt, being collateral to the material issues involved and likely to confuse the jury [see, *People* v. *Ramistella,* 306 N.Y. 379 (1954); *Richardson on Evidence* §502, 503].

C. The Charge Was Free of Error

The Court instructed the jury on the issue of criminal intent as follows:

> "Guilty knowledge means not only actual knowledge but also constructive knowledge, and this may be shown by the establishment of circumstances from which guilty knowledge may be fairly inferred.
>
> "Guilty knowledge need not be direct knowledge, as a person would have if he was an eyewitness to a larceny. It is sufficient if the attending circumstances are such as to furnish defendant with knowledge that the property had been stolen."

Petitioner claims that the definition of guilty knowledge as being "not only actual knowledge but also constructive knowledge" is a misstatement of New York law.

In evaluating the quantum of knowledge necessary to convict of a charge involving stolen property, the New York Court of Appeals in *People* v. *Dowling,* 84 N.Y. 478, 485 (1881), held that "the direct proof of knowledge of the larceny is not needed to convict of receiving stolen goods with guilty knowledge. That knowledge may be gathered from the circumstances of the case, of whcih one is the buying the goods at an under valuation" [see, *People* v. *Silinsky,* 235 A.D. 289 (1st Dept. 1932)]. So too, this

Court in *Rosenthal* v. *New York*, 226 U.S. 260, 267-8 (1912), citing *People* v. *Dowling, supra*, has interpreted "the decisions of the courts of New York [to] hold that actual knowledge of the fact that the property is stolen is unnecessary, and that anything in the circumstances that would put an honest or prudent man upon inquiry is sufficient to warrant a conviction."

In view of the context of the entire charge in which the Court used such phrases as "the establishment of circumstances from which guilty knowledge may be fairly inferred "and " if the attending circumstances are such as to furnish a defendant with knowledge," the term "constructive" is not a misstatement of the type of knowledge required. One word should not be lifted out of context for the implication accompanying such a practice may indeed be very remote from the clear impression to be derived from a consideration of the whole effect [*United States* v. *Hernandez*, 361 F. 2d 446 (2d Cir. 1966); *People* v. *Donaldson*, 295 N.Y. 158 (1946)].

The Court also charged that "since Arrighi is an accomplice, you must examine his testimony very closely, and receive it with great caution". Such is sufficient protection to assure that an accomplice's testimony will be weighed carefully [see, *Cash* v. *Culver*, 358 U.S. 633 (1959)]. There is no need to charge, with respect to an accomplice, that he has an "interest" in the case and might have an "inducement" to testify falsely. The failure to so charge did not prejudice the petitioner. The Court's otherwise proper instruction was not rendered insufficient by the omission of the additional, superfluous, albeit correct, instruction offered by the petitioner.

In neither instance did petitioner except to the charge or request the Court to charge differently than it did. This failure precluded him from raising the objection on appeal to the Court of Appeals [New York Code Crim. Proc. §420-a; *People* v. *Vidal*, 26 N.Y. 2d 249 (1970); *People* v. *Reynolds*, 25 N.Y. 2d 489 (1969); *People* v. *Baker*, 23 N.Y. 2d 307 (1968); *People* v. *Cohen*, 5 N.Y. 2d 282 (1959)]. It has been held by this Court on numerous occasions that a litigant must follow state procedures in raising a federal question and that, when required by state practice, the federal question must be raised before the trial court [*Williams* v. *Georgia*, 349 U.S. 375 (1950); *Brown* v. *Massachusetts*, 144 U.S. 573 (1891)]. If reasonable state procedural requirements are not observed, as in the instant case, the Court will decline to exercise jurisdiction [*Ferguson* v. *Georgia*, 365 U.S. 570 (1960); *In re Lamkin*, 355 U.S. 59 (1957)].

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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